



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** System Dynamics International, Inc.

**File:** B-253957.3

**Date:** November 8, 1993

J.C. White for the protester.  
Robert B. MacFarlane, Esq., Department of the Army, for the agency.  
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of agency's dismissal of agency-level protest that awardee did not submit a proposal for the contract for which it received award is dismissed where record shows it lacks a valid basis.

2. Untimely protest alleging awardee has improper subcontractor and teaming agreements, and has violated the Certificate of Independent Price Determination, will not be considered under "significant issue" exception to General Accounting Office (GAO) timeliness requirements where these issues have been considered in prior GAO decisions.

### DECISION

System Dynamics International, Inc. (SDI) protests the award of a contract to Westar Corporation under request for proposals (RFP) No. DAAJ09-92-R-0369, issued by the Department of the Army, Army Materiel Command, for programmatic and technical support services (PATS). SDI primarily argues that Westar failed to submit a timely proposal for the contract for which it received award.

We dismiss the protest.

The PATS acquisition strategy provided for one solicitation containing a separate statement of work (SOW) for each of three service areas: technical, logistics, and programmatic. The RFP, issued on October 30, 1992, anticipated award of up to nine indefinite quantity contracts. Three awards could be made under each of the SOWs: one to a section 8(a) firm, one to a small business, and one unrestricted award. The RFP's section L.10.E instructed bidders to "identify clearly" whether they were proposing as a large business, small business, or section

8(a) contractor. In a December 9 letter, the agency, in response to a prospective offeror's question,<sup>1</sup> instructed each offeror to indicate which SOWs and which types of award they were proposing against. Offerors were required to submit a separate proposal for each SOW, but not necessarily for each type of award. After the evaluation of initial proposals, discussions were conducted and best and final offers (BAFOs) were received on February 22, 1993. Westar was awarded the small business portion of the technical SOW on May 26.

On September 13, SDI filed an agency-level protest of the award, arguing that Westar had not submitted a proposal for the small business portion of the technical SOW. SDI also argued that even if Westar had submitted such a proposal, the Army should have rejected it based upon alleged improprieties surrounding its subcontractor and teaming agreements, as well as an alleged violation of the Certificate of Independent Price Determination (CIPD).

The agency dismissed SDI's protest on October 1. The Army stated that Westar had competed in all three categories--small business, section 8(a), and unrestricted--for the technical SOW. On the cover letter of its proposal, the Army explained, Westar stated that while its proposal was being submitted in response to the section 8(a), technical set-aside, the firm was "willing to make the offer valid for the Small Business and/or Full and Open portions of the effort. . . ." The Army found the other issues raised by SDI to be untimely, since it considered that the protester knew or should have known of these bases of protest when it was notified of the May 26 award to Westar. Upon learning of the dismissal of its agency-level protest, SDI filed this protest in our Office on October 12.

SDI challenges the agency's finding that Westar submitted a proposal for the small business portion of the technical SOW. SDI explains that on September 24, after it filed the agency-level protest, it received information pursuant to a Freedom of Information Act (FOIA) request which it asserts shows that Westar submitted a late proposal for the small business portion of the technical SOW. SDI argues that the Army ignored this "main issue for protest," and further complains that the Army failed to consider its request that the protest be considered regardless of its timeliness under the "significant issue" exception to the timeliness regulations.

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<sup>1</sup>This question, reproduced in the letter, was, "If an 8(a) wants to be considered for the 8(a), small business, and full-and-open awards, must they submit separate proposals?"

While the agency's decision states that the protest was dismissed as untimely, its discussion of timeliness does not include SDI's allegation that Westar did not submit a proposal for the contract for which it received award; rather, the decision's discussion of timeliness centers around the other allegations raised in the protest: the propriety of subcontractor and teaming arrangements, alleged violations of the CIPD, and so on. Rather, the agency's response to the allegation that Westar did not submit a proposal for the small business portion of the technical SOW is a factual rebuttal which implies that the allegation lacks a valid basis.

As discussed above, the RFP stated that offerors were required to "identify clearly" whether they were proposing as a large business, small business, or section 8(a) contractor. Accordingly, both Westar's proposal and its cover letter to that proposal clearly indicated that the firm was proposing as a section 8(a) contractor. The December 9 agency letter further explained that offerors could propose against one or more of the three types of awards, so long as they indicated which award or awards they were proposing against; offerors were not required to submit a separate proposal for each type of award. As the Army explained in its decision, Westar's cover letter to its proposal indicated that, while it was submitting the proposal as a section 8(a) contractor, it was willing to propose against the small business and unrestricted awards as well. When the cover letter and the proposal are read together, it is clear that Westar complied with the agency's instructions and made its proposal available for all three awards. As a result, SDI's allegation that Westar did not submit a proposal for the small business portion of the technical SOW is without a valid basis.<sup>2</sup>

To the extent that SDI reasserts the remaining allegations it raised in the agency-level protest, under our Bid Protest Regulations, a matter initially protested to an agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office. 4 C.F.R. § 21.2(a)(3); G. Davidson Co., Inc., B-249331, July 14, 1992, 92-2 CPD ¶ 21. SDI does not dispute the Army's determination that these allegations were untimely filed; rather, it objects to the Army's failure to


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<sup>2</sup>SDI's new allegation, that Westar submitted a late proposal for the small business portion of the technical SOW, is untimely on its face. While SDI states that it first obtained knowledge of this basis of protest on September 24, it did not protest on this basis until October 12, more than 10 working days later. 4 C.F.R. § 21.2(a)(2) (1993).

consider the protest, notwithstanding its untimeliness, under the "significant issue" exception.

Federal Acquisition Regulation (FAR) § 33.103(b)(2) provides that an agency may consider an untimely protest that raises issues significant to its acquisition system. We have no basis to question the agency's failure to consider SDI's protest under the "significant issue" exception to the FAR's timeliness requirements. The FAR requirements mirror those of our Regulations; in order to prevent those requirements from becoming meaningless, we limit the use of the significant issue exception to protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. See 4 C.F.R. § 21.2(c); Dyncorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. We have previously considered the issues of subcontractor's rights against prime contractors, see Beall Plumbing and Heating Co., B-243230, Mar. 21, 1991, 91-1 CPD ¶ 315, as well as the allegedly improper use by one party of another party's pricing information, raised in the content of an alleged violation of the CIPD, see Secure Eng'g Servs., B-252270.2; B-252271.2, June 11, 1993, 93-1 CPD ¶ 452. We therefore do not consider these significant issues for the purpose of exempting SDI's protest from either the FAR timeliness requirements or those of our Regulations.

The protest is dismissed.

  
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Assistant General Counsel